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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

SAMUEL R. BROWN, ALMIRA B. MILLARD, ALFRED MILLARD and HUGH MILLARD,

Petitioners,

against

IRVING TRUST COMPANY, as Trustee in Bankruptcy of United Cigar Stores Company of America, a New Jersey corporation,

Respondent.

RESPONDENT'S CONSENT TO WRIT

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To the Honorables, The Chief Justice of the United States and the Associated Justices of the Supreme Court of the United States:

This is a petition for a writ of certiorari to review an affirmance by the Circuit Court of Appeals of the Second Circuit of an order expunging a claim in bankruptcy for future rent.

I

Respondent bases its consent upon the importance of the issue presented and the number of similar cases now pending in the lower Courts.

Numerous claims of this character have been made in the administration of the present estate in bankruptcy and are now pending before the lower Courts. In several recent decisions the Circuit Court of Appeals has in its opinions used expressions indicating that further review of the question must be had, if at all, in this Court or in the legislature.

Accordingly, the respondent, reserving the presentation of its argument on the merits for final hearing, consents to the granting of the petition.

This consent is premised upon the importance of the issue presented,—importance both to the present estate, and to numerous other bankrupt estates now in process of administration. It is not based upon any suggestion that the case was wrongly decided below, for the respondent is confident that both the decided cases and the principles of a wise administration of justice are against a reversal of the decisions below.

II

Respondent will argue at the hearing on the merits that the law in its present state supports the respondent's position, that there are sound reasons of policy why the law should not be changed, and that the change if there is to be one should be made by the legislature and not by the courts.

1. RESPONDENT BELIEVES THAT THE PETITIONERS' BRIEF HAS MISCONSTRUED THE DECIDED CASES AND THAT THE PRESENT RULE OF LAW IS CLEARLY AGAINST THE PETITIONERS' POSITION.

The petitioners admit, as they must, that the weight of authority of the decided cases both in the Second Circuit and the other lower Federal Courts is against them. Their contention is that the *ratio decidendi* of certain recent cases in this Court must result in a change in the rule established below.

The respondent is advised that the cases in this Court, which are relied upon by the petitioners, dealt with an entirely different subject-matter and are properly distinguishable.

The respondent is further advised that there is no true conflict between the Circuits.

The principle of law, upon which the Referee, District Court and Circuit Court of Appeals decided this case, has long been settled in the Second Circuit and in other circuits. Valuable rights running into many millions of dollars have become vested in reliance upon that rule of law.

2. LANDLORDS AND TENANTS THROUGHOUT THE COUNTRY HAVE FIXED THEIR LEGAL RELATIONS IN RELIANCE UPON THE PRESENT RULE OF LAW, WHICH THEREFORE SHOULD NOT BE CHANGED.

The doctrine that claims for future rent are not provable in bankruptcy, has been long established, and innumerable landlords have refrained from filing proofs of claim of this character.

Not merely would a change in the law be unjustly discriminatory against those landlords who have relied upon the existing law, but it would result in throwing into chaos the administration of the present estate, involving as it does many millions of dollars. In this very estate the holders of only a small fraction of the landlords' claims have filed. The great majority have evidently assumed that the law is established that such claims are not provable in bankruptcy. A change in the law would be a serious blow to them, as the six months' period for filing claims has long since expired.

Moreover, whatever may be true of *corporate* lessees, innumerable *individual* lessees who have been discharged in bankruptcy in prior cases are under the existing law required to continue the payment of their current rental obligations when due. A contrary decision at this time would deprive their landlords of their continuing rights at a time when it is too late for them to reassert what would have been their rights if their claims had been known to be provable. And it would give to discharged bankrupts, who are now paying their rental obligations regularly, a release which they have not earned.

3. THE PRESENT RULE OF LAW IS SUPPORTED BY REASONS OF POLICY AS WELL AS OF HISTORY.

Mr. Justice Holmes remarked in an important case that the law of leases has not forgotten Lord Coke. The petitioners and the *amici curiae* jump to the conclusion that the position of the respondent is supported only by antiquity.

But there are practical reasons behind the rule as well. There is a real difference between the landlord and the other classes of creditors,—a difference that may well have been realized by those responsible for establishing the existing rule. A bondholder or a merchandise creditor has at the date of bankruptcy actually provided the bankrupt with money or property. A landlord, on the other hand, has merely promised to hold certain land available to the bankrupt in the future.

The brief of the *amici curiae* overlooks these considerations and lightly assumes that the rule against provability of future rent claims is a "nation-wide scandal". Reference is made to "chain store corporations which, although solvent in many cases, have resorted to bankruptcy as a vehicle for corporate reorganization". Assuming that this charge applies to the present case, it does not follow that the corporation or its stockholders can through bankruptcy benefit at the expense of those having prior rights. If a reorganization be effected by a composition in bankruptcy, the landlords would be reinstated as full creditors of the bankrupt. There is no decision that even on a reorganization through sale the stockholders could buy back the properties and ignore the rent claims.

4. ANY CHANGE IN THE PRESENT RULE OF LAW MAY BE APPROPRIATELY LEFT TO THE LEGISLATURE.

The respondent is therefore advised that, even if this Court were of the opinion that the law *ought* to be changed, or that there *ought* to be one bankruptcy law for individuals and another for corporations, this Court may under the circumstances well leave such a decision to the Congress. Such proposed legislation as has been submitted by responsible landlords has contained provisions limiting the amount recoverable by landlords, it being recognized that the only change which could be made in the law by the courts, *i.e.* a complete change, would result in giving to landlords a disproportionately large share in any estate.

Respectfully submitted,

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